Supreme Court, U.S.
FILED

041564 MAY 18 2005

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOSE RAMON GARCIA and
EDWARD MICHAEL POWERS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MATTHEW PAVONE
Courtyard Square
750 Grant Avenue,
Suite 250
Novato, CA 94945
Telephone: (415) 209-9610

Attorney for Petitioner Jose Ramon Garcia

DENNIS P. RIORDAN
Counsel of Record
DONALD M. HORGAN
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472

Attorneys for Petitioner Edward Michael Powers

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Petitioner Garcia gave incriminating statements to state investigators after they erroneously informed him that his previous compelled statements could be used against him. Do the analysis of *Kastigar v. United States*, 406 U.S. 441 (1972) and the doctrine of the "fruit of the poisonous tree" apply to such a situation, thus precluding the use of the incriminating statements at trial?

II. The government successfully moved to disqualify Petitioner Powers's counsel of choice. May a district court disqualify a counsel of choice after it conducts an *ex parte*, *in camera* meeting with the government, even where the government's representations concerning the grounds for disqualification turn out to be false?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	3
B. October 2nd Statements	3
C. Disqualification of Counsel	5
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT SHOULD CLARIFY THE RELATIONSHIP BETWEEN *KASTIGAR* AND *ELSTAD* IN ORDER TO DISPEL CONFUSION ABOUT WHICH STANDARD APPLIES TO EVIDENCE DERIVED FROM COMPELLED INTERROGATION	7
II. THIS COURT SHOULD CLARIFY WHAT STANDARDS APPLY FOR DISQUALIFYING A CRIMINAL DEFENDANT'S COUNSEL OF CHOICE, AND WHAT DUE PROCESS RIGHTS A DEFENDANT HAS IN DISQUALIFICATION PROCEEDINGS	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Abraham v. United States, 549 F.2d 236 (2d Cir. 1977) 13

Arizona v. Fulminante, 499 U.S. 279 (1991) 11

Harrison v. United States, 392 U.S. 219 (1968) 9, 10

Kastigar v. United States, 406 U.S. 441 (1972) 7, 8, 9, 10

Kentucky v. Stincer, 482 U.S. 730 (1987) 11

Lefkowitz v. Turley, 414 U.S. 70 (1973) 8, 9

Lybarger v. Los Angeles, 40 Cal. 3d 822 (1985) 4, 10

Missouri v. Seibert, 124 S. Ct. 2601 (2004) 10, 11

New Jersey v. Portash, 440 U.S. 450 (1979) 4

Oregon v. Elstad, 470 U.S. 298 (1985) 7, 9, 10

Perri v. Director, Department of Corrections, 817 F.2d 448 (7th Cir. 1987) 9

Rodriguez v. Chandler, 382 F.3d 670 (7th Cir. 2004) ... 14, 15

United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) 13

United States v. Greig, 967 F.2d 1018 (5th Cir. 1992) 12

United States v. Hubbell, 530 U.S. 27 (2000) 7

United States v. Hylton, 294 F.3d 130 (D.C. Cir. 2002) 8

United States v. Jones, 44 F.3d 860 (10th Cir. 1995) 13

United States v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998) 13

United States v. Lussier, 71 F.3d 456 (2d Cir. 1995) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Mays, 69 F.3d 116 (6th Cir. 1995) 13

United States v. Patane, __ U.S. __, 124 S. Ct. 2620 (2004) 10, 11

United States v. Pelullo, 173 F.3d 131 (3d Cir. 1999) 8

STATUTES AND RULES

18 U.S.C. § 241 ..... 1, 2

18 U.S.C. § 242 2

28 U.S.C. § 1254 1

28 U.S.C. § 2254(a) 1

Fed. R. Crim. Pro. 44(c) 13

PETITION FOR WRIT OF CERTIORARI

Petitioners, Jose Garcia and Michael Powers, respectfully pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeal for the Ninth Circuit entered on October 29, 2004.

OPINION BELOW

The unpublished opinion of the United States Court of Appeal for the Ninth Circuit was filed on October 29, 2004 and is reproduced at Appendix 1-4.

JURISDICTION

On October 29, 2004, a three-judge panel of the United States Court of Appeal for the Ninth Circuit issued an opinion denying petitioners' appeal from their May, 2002 convictions for conspiracy to violate prisoners' constitutional rights (18 U.S.C. § 241). (Appendix 1-4) Petitioners filed a timely petition for rehearing alerting the panel that it had failed to reach one of the claims presented. On January 18, 2005, the same panel denied the petition for rehearing without amending the opinion and without further comment. (Appendix 25-26) Petitioner thereafter sought and received from this Court an extension of time, to and including May 18, 2005, to file the instant petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 and 2254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Self-Incrimination Clause of the Fifth Amendment provides that "No person shall be . . . compelled in any criminal case to be a witness against himself."

The Due Process Clause of the Fifth Amendment provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This case involves (1) the use of evidence derived from compelled testimony and (2) the disqualification of a defendant's counsel of choice after an *ex parte*, *in camera* hearing, which the defendant and his counsel were precluded from attending.

Petitioners Garcia and Powers worked as California state correctional officers at the Pelican Bay State Prison ("PBSP"). They were charged in federal court with assaulting prisoners in violation of 18 U.S.C. § 242, and with conspiring to violate the rights of prisoners in violation of 18 U.S.C. § 241. The district court dismissed the assault charge against Powers pursuant to Rule 29. The jury found Garcia not guilty of the assault charge, but it found both defendants guilty of conspiracy.

A. Factual Background

The charges arose out of petitioners' employment at PBSP in the early 1990s, a time of persistent violence, gang wars, and racial strife at the prison. PBSP prisoners frequently sought to remove from their yards inmates convicted of sex offenses, and in particular offenses against children. Prison guards such as Powers and Garcia had a duty to attempt to prevent or minimize inmate assaults and to protect those who had been assaulted, including those committed as sex offenders.

The theory of conspiracy liability on which the petitioners were tried was that Garcia and Powers "would assault or cause to be assaulted inmates convicted of sex offenses or otherwise disfavored by the defendants, without legal justification," thereby "cleaning" their yard of inmates likely to cause disruption. In its effort to prove that theory, the government introduced evidence concerning a handful of the hundreds of assaultive incidents occurring at PBSP over the years between 1991 and 1996.

Most of the testimony regarding those incidents was given by the inmates who carried out the assaults, and who thus had an interest in giving testimony favorable to the government. The jury nonetheless accepted enough of the testimony to find the defendants guilty on one count each. Given the wide variety of unconnected incidents admitted at trial, however, it is far from clear what theory of conspiracy the jury ultimately accepted.

B. October 2nd Statements

Petitioner Garcia was questioned by investigators on September 29, 1995. Garcia initially invoked his *Miranda* rights and refused to answer questions. He was

then compelled to answer under *Lybarger v. Los Angeles*, 40 Cal.3d 822 (1985), which held that public officials in California may be compelled to give testimony, but that the Fifth Amendment precludes subsequent use of that testimony.

Although the Self-Incrimination Clause prohibits the use of compelled testimony for *any purpose*, including impeachment, *see New Jersey v. Portash*, 440 U.S. 450 (1979), the investigators erroneously instructed Garcia that his compelled testimony could be used to impeach him at trial.

Having been erroneously told that his statements of September 29th could be used against him, petitioner Garcia contacted investigators the next day and asked for an opportunity to correct and clarify some of his statements. He thus met again with investigators on October 2nd, three days after the initial interview. The statements given by Garcia during the October 2nd interview ultimately constituted crucial evidence admitted against both petitioners at trial.

Prior to trial, petitioners moved to exclude the October 2nd interview on the basis that it was the fruit of the compelled September 29th interview. While excluding small portions of the October 2nd interview, the court admitted most of the statement, finding the government had demonstrated "a wholly independent basis" for much of the interview. Following the verdicts and the entry of the judgments (Appendix at 5-24), the Ninth Circuit panel affirmed the trial court's ruling; it held that Garcia "voluntarily requested to meet with" investigators, and therefore that "he became an independent and legitimate source of the evidence." (Appendix at 2)

C. Disqualification of Counsel

After his arrest, petitioner Powers retained the law firm of Rains, Lucia & Wilkinson to act as his counsel for all purposes. The government moved to disqualify those lawyers because the firm had previously represented seven current and former PBSP employees who had testified before the grand jury. The government claimed in its disqualification motion that it would "undoubtedly call some if not all seven of the Rains/Lucia clients in its case-in-chief."

Defense counsel countered that they had taken on Powers as a client only after determining that neither a conflict nor a substantial potential for conflict existed. In addition, Powers had signed a waiver of any claim based on a future conflict. The government nonetheless sought to disqualify Powers's counsel of choice.

The government appeared before the district court outside the presence of Powers and his counsel to describe the nature of the testimony it expected to elicit from the seven witnesses. At the court's request, the government filed a detailed written description of its intended use of the seven witnesses. The document was filed under seal and was not provided to defense counsel.

The district court granted the government's motion and disqualified Powers's counsel of choice because, based on the government's assurances, it concluded that "these witnesses will certainly be called as this matter proceeds through trial." As it turned out, however, only one of the seven witnesses was actually called at trial. The government's assurances that the witnesses were vital, and that they created a substantial conflict, turned out to be false.

At trial, petitioner was unable to respond to the government's proffer and arguments in support of disqualification because he had no access to the contents of the proffer and no knowledge of the nature of the government's argument. Only on appeal was Powers finally granted access to the contents of the government's *ex parte* communication with the court and the written proffer that was submitted in support of the disqualification motion. Based on those materials, Powers demonstrated on appeal that numerous statements made by the government in support of its disqualification motion had proven false.

The Ninth Circuit panel nonetheless concluded that the district court had not abused its discretion by disqualifying Powers's counsel of choice. The panel also concluded that the district court had done nothing improper by conducting an *ex parte* hearing and accepting a sealed proffer because Powers had notice of the hearing and an opportunity to present evidence and argument against disqualification. (Appendix at 2)

REASONS FOR GRANTING THE WRIT

Rule 10(c) of the Rules of the Supreme Court identifies the following as a compelling reason why this Court may choose to review a decision of a United States court of appeals on certiorari:

> When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10(a), moreover, states, that an issue may also warrant review on certiorari when, *inter alia*, " . . . a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . " *Ibid.*

As discussed in Argument I, below, the Ninth Circuit's disposition of petitioner Garcia's claim concerning the government's use of his compelled testimony at his criminal trial implicates the first or, alternatively, the second of the criteria set forth in Rule 10(c).

As discussed in Argument II, below, petitioner Power's claim relating to his exclusion from an *ex parte* meeting between prosecutors and the district court at which prosecutors misrepresented matters bearing on disqualification implicates the initial criteria stated in Rule 10(c) (settlement of important federal question), as well as the cited criteria (resolution of circuit conflict) set forth in Rule 10(a).

I THIS COURT SHOULD CLARIFY THE RELATIONSHIP BETWEEN *KASTIGAR* AND *ELSTAD* IN ORDER TO DISPEL CONFUSION ABOUT WHICH STANDARD APPLIES TO EVIDENCE DERIVED FROM COMPELLED INTERROGATION

The government may not use evidence derived from compelled testimony. When seeking to admit evidence arguably derived from such testimony, the government bears the burden of "prov[ing] that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 461 (1972); *see also United*

States v. Hubbell, 530 U.S. 27, 38 (2000) (stating that compelled testimony is entitled to both "use" and "derivative-use" immunity).

In this case, there is no question that the September 29th interview with petitioner Garcia was compelled. The only disputed question involves the legal status of the subsequent interview – namely, whether the fruit of the poisonous tree doctrine applies to the statements elicited therein.

Given this Court's repeated pronouncements on the matter, there *should* be no question that the rule of *Kastigar* and the fruit of the poisonous tree doctrine apply in cases such as this, where a public employee is compelled to answer questions in a state investigation. A state employee "protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers *and evidence derived therefrom* in any subsequent criminal case in which he is a defendant." *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) (citing *Kastigar*) (emphasis added). The government therefore should have been required to prove that the October 2nd interview "was not prompted by" the prior, compelled testimony. *United States v. Pelullo*, 173 F.3d 131, 134 (3d Cir. 1999).

But in order to avoid the implications of *Kastigar*, the government in its arguments below denied its applicability and looked instead to a different body of law. *See United States v. Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002) ("The government, presumably realizing the depth of *Kastigar* water in which it is floundering seeks both indirectly and directly to avoid *Kastigar* altogether."). The government argued that the burden of *Kastigar* did not apply, and that

the case should be analyzed instead under this Court's decision in *Oregon v. Elstad*, 470 U.S. 298 (1985). Based on *Elstad*, the government argued that courts have rejected tests of "but for" causation in analyzing whether evidence was derived from compelled testimony. *But see Harrison v. United States*, 392 U.S. 219, 225 (1968) (specifically adopting a "but for" test).

The government essentially argued, in other words, that *Elstad* and other *Miranda* cases had entirely superseded *Kastigar*, *Lefkowitz*, and their progeny.[1] Consequently, it did not seriously attempt to prove that it had a "wholly independent" source for the October 2nd interview,[2] because, in its view, it was not required to do so.

---

[1] The confusion about the relationship between *Kastigar* and *Elstad* has arisen before. *See, e.g., Perri v. Director, Dept. of Corrections*, 817 F.2d 448, 450 n.1 (7th Cir. 1987).

[2] The Ninth Circuit panel did not settle the question – it cited neither *Kastigar* nor *Elstad*. Instead, the panel simply ruled, cryptically, that the October 2nd statements were admissible because Garcia himself voluntarily requested to meet with investigators, and because he was Mirandized prior to the October 2nd interview. (Appendix at 2-3)

Any careful analysis of causation would have been guided, first and foremost, by this Court's decision in *Harrison v. United States*, *supra*, which the Ninth Circuit also failed to cite. In *Harrison*, at the defendant's first trial, the government improperly admitted a confession, and the defendant testified in order to respond to it. Upon retrial, the government sought to admit the defendant's testimony from the first trial. But because the defendant had only testified to respond to the illegally admitted statements, this Court held that the testimony was inadmissible as the fruit of a poisonous tree. *Id.*, 392 U.S. at 222.

By the same token, petitioner Garcia only spoke to investigators on October 2nd in order to respond to his compelled September 29th interview, and thus, under *Harrison*, the October 2nd interview should have been excluded. The Ninth Circuit's reasoning that Garcia himself contacted investigators and thus that he himself was the "source" of the October 2nd interview would be equivalent to saying that Harrison

(Continued on following page)

This Court's recent decision in *United States v. Patane*, __ U.S. __, 124 S. Ct. 2620 (2004), however, reaffirmed the very distinction that the government sought to obliterate. For the purposes of the fruit of the poisonous tree doctrine, there is a difference between "statements taken without *Miranda* warnings (though not actually compelled)" and "actually compelled testimony." *Id.* at 2627 (2004). This case involved the latter – the "actually compelled" statements taken on September 29th. As a result, the *Kastigar* analysis should have applied.

Even if *Elstad* were the applicable causal test for this case, moreover, this Court's recent decision in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), thoroughly undermines the argument that the October 2nd interview was independent of the September 29th interview. In both *Seibert* and this case, it was *an intentional act* by the government that produced the second stage of interrogation – in *Seibert*, the use of successive warned and unwarned phases of interrogation; in this case, the false instruction to the defendant that compelled *Lybarger* statements could be used against him. Here, as in *Seibert*, there is "no practical justification . . . for treating the second stage of interrogation as distinct from the first." 124 S. Ct. at 2610.

Whatever the underlying basis for the Ninth Circuit's unintelligible ruling, this Court should grant certiorari to reconcile *Elstad* and *Kastigar*, and to clarify which test applies in which circumstances. At a minimum, this Court

---

himself chose to take the stand and thus that he himself was the "source" of the testimony.

In short, if both *Kastigar's* fruit of the poisonous tree doctrine and *Harrison's* analysis of causation had been properly applied, this should have been an easy issue and resolved in petitioner Garcia's favor.

should remand this case to the Ninth Circuit for reconsideration in light of *Patane* and *Seibert*.

II. THIS COURT SHOULD CLARIFY WHAT STANDARDS APPLY FOR DISQUALIFYING A CRIMINAL DEFENDANT'S COUNSEL OF CHOICE, AND WHAT DUE PROCESS RIGHTS A DEFENDANT HAS IN DISQUALIFICATION PROCEEDINGS

The district court's decision to disqualify Powers's counsel of choice was flawed both procedurally and substantively. As a procedural matter, the district court's receipt of sealed information and its decision to conduct an ex parte hearing with only the government in attendance violated Powers's Fifth Amendment due process rights.

A criminal defendant has a right to be present at any critical stage of the proceeding against him. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The Ninth Circuit panel's opinion did not directly dispute that a hearing regarding disqualification of a defendant's counsel is a critical stage of a trial. Rather, the panel appears to have concluded that the right to be present was vindicated because Powers was given "notice of the hearing and proffer and was given the opportunity to present evidence and argument in opposition to disqualification." (Appendix at 2)

This ruling is both unprecedented and of potentially sweeping consequences. While it is true that Powers and his lawyer were told that a closed hearing had occurred and that a sealed proffer had been submitted by the government to the district court, and it is also true that the defense was given a chance to submit papers in opposition to whatever

arguments the government made at that hearing and in that proffer, Powers and his counsel were forced to do so without being informed as to *what* information the government had provided to the district court in the closed hearing or the sealed proffer. The panel's opinion thus appears to reduce a defendant's right to be present with counsel during a critical stage of his or her trial to nothing more than an opportunity to respond to what the prosecution says during that hearing, even if the defendant and counsel do not know the content of the statements.

Under such a cramped view of the due process right, a defendant such as Powers would not be deprived of due process if he and his counsel were barred from being present when a prosecutor presents a motion to exclude defense evidence or even during the government's closing argument, provided only that the defense is permitted to present its side of the story, albeit in ignorance of what the government has said to the trial judge or jury.

The Ninth Circuit panel did not cite a single case supporting such a constricted reading of the Fifth Amendment and a criminal defendant's right to be present at a disqualification hearing and his opportunity to present meaningful opposition to the government's motion to disqualify. In fact, the procedures employed in this case did not comply with the legal standards adopted by other circuits.

The government sought to disqualify Powers's counsel of choice on the basis that the counsel would have a conflict of interest. As other circuits have stated clearly, a district court has "a duty to conduct a hearing once it has been alerted and certainly when it knows of the existence of an actual conflict of interest." *United States v. Greig*,

967 F.2d 1018, 1022 (5th Cir. 1992); *accord Abraham v. United States*, 549 F.2d 236, 239 (2d Cir. 1977); *see also* Fed. R. Crim. Pro. 44(c).

A hearing is thus the proper, routine, and legally prescribed procedure for examining a motion to disqualify a defendant's counsel of choice due to conflict. *See United States v. Alred*, 144 F.3d 1405, 1410-11 (11th Cir. 1998); *United States v. Lussier*, 71 F.3d 456, 461 (2d Cir. 1995); *United States v. Jones*, 44 F.3d 860, 872-73 (10th Cir. 1995). In fact, a hearing is even required, as a matter of due process, where asset forfeiture might deprive a defendant of funds to pay his counsel of choice. *United States v. Kirschenbaum*, 156 F.3d 784, 791 (7th Cir. 1998).

All of these cases contemplate a hearing at which both parties are present and have the opportunity to present evidence and argument. In *Lussier*, for example, the Second Circuit ruled that the district court had satisfied its obligation to inquire in part because it had conducted a hearing at which defense counsel had an opportunity to explain why there was no conflict requiring disqualification. *See* 71 F.3d at 461. Indeed, as the Sixth Circuit has stated, a motion by the government to disqualify a defendant's counsel of choice typically requires "a hearing at which *both parties* will be permitted to produce witnesses for examination *and cross-examination*." *United States v. Mays*, 69 F.3d 116, 121 (6th Cir. 1995) (emphasis added).

None of these cases, nor anything in this Court's jurisprudence, has ever suggested that a trial court may fulfill its duty to conduct a hearing by meeting with only one party *ex parte*. The novel procedure adopted by the district court and endorsed by the Ninth Circuit should be examined by this Court.

Even putting aside the unfairness of the secret procedure employed below, the district court's decision to disqualify Powers's counsel of choice was substantively incorrect because it was based on a proffer of evidence that turned out to be false.

The Seventh Circuit recently faced the same situation, and it reached a conclusion directly at odds with the Ninth Circuit's decision below. In *Rodriguez v. Chandler*, 382 F.3d 670 (7th Cir. 2004), the prosecutor successfully moved to disqualify the defendant's counsel on the grounds that counsel had previously represented someone whom the prosecutor planned to call as a witness. "When trial arrived, however, the prosecutor failed to call" the witness. *Id.* at 671. In an opinion authored by Judge Easterbrook, the Seventh Circuit held that because disqualification "stemmed from" the prosecutor's assurance that the witness was vital – an assurance that turned out to be false – the disqualification was error. *Id.* at 672.

This case mirrors *Rodriguez*. In fact, if anything, the government's misrepresentations here were far more serious. Among other things, the government stated in its proffer that it would call seven witnesses whom Powers's counsel had previously represented. Based on the government's assurances, the district court granted the motion to disqualify because, it said, "these witnesses will certainly be called as this matter proceeds through trial."

As it turned out, only one of seven witnesses was called. As it turned out, the potential conflict involving Powers's counsel was far less serious than the government represented to the court. As it turned out, the government's assurance that all seven witnesses were vital was false.

A district court has some discretion in handling motions to disqualify a defendant's counsel of choice. But that discretion is surely premised on the assumption that relevant representations made to the court are reasonably accurate. In this case, as in *Rodriguez*, the government's representations were false. This Court should grant certiorari to clarify that the government may not disqualify a defendant's counsel of choice, and thus infringe his Sixth Amendment right to counsel, based on false representations.

CONCLUSION

The convictions in this case were obtained as a result of several grievous legal errors. The Ninth Circuit's slipshod opinion did not even identify the controlling legal principles, much less apply them properly. This Court should grant certiorari in order to dispel the legal confusions on which petitioners' convictions rest.

Dated: May 18, 2005

Respectfully submitted,

DENNIS P. RIORDAN
Counsel of Record
DONALD M. HORGAN

Counsel for Petitioner
Edward Michael Powers

114 Fed.Appx. 292, 2004 WL 2453249 (9th Cir.(Cal.))

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America,
Plaintiff-Appellee,

v.

Jose Ramon GARCIA, Edward Michael Powers,
Defendants-Appellants.
Nos. 03-10067, 03-10071.
D.C. No. CR-00-00105-MJJ.

Argued and Submitted Sept. 14, 2004.
Decided Oct. 29, 2004.

Jeff Cole, Hannah Horsley, Office of the U.S. Attorney, San Francisco, CA, for Plaintiff-Appellee.

Dennis P. Riordan, San Francisco, CA, for Defendants-Appellants.

Appeal from the United States District Court for the Northern District of California; Martin J. Jenkins, District Judge, Presiding.

Before OAKES,* KLEINFELD, and CALLAHAN, Circuit Judges.

---

* The Honorable James L. Oakes, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

MEMORANDUM**

Jose Garcia and Edward Michael Powers, both former prison guards at Pelican Bay State Prison, appeal their May 2002 convictions for conspiracy to violate prisoners' constitutional rights in violation of 18 U.S.C. § 241.

We hold there was no abuse of discretion in the pretrial disqualification of Powers's counsel. The attorney in question had represented numerous current or former Pelican Bay prison guards who testified before the federal grand jury, some of whom the government contemplated calling as witnesses. The situation presented a serious potential for conflict of interest. We further hold that the district court's *ex parte* hearing and acceptance of a sealed proffer did not deny Powers due process because he had notice of the hearing and proffer and was given the opportunity to present evidence and argument in opposition to disqualification.

The October 2 interview was properly admitted because Garcia voluntarily requested to meet with Agent Ortiz alone, the interview took place at a motel, three days after the administrative interrogations, Garcia was specifically advised of his Miranda rights and waived them, and therefore he became an independent and legitimate source of the evidence.

Furthermore, Powers has not shown that the jury's consideration of the unredacted statement by Garcia in the October 2 interview was prejudicial error. We find that the independent evidence of the conspiracy renders the

---

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

admission harmless. In his November 1995 interview with the FBI, Powers acknowledged meeting with Garcia and Branscum in his office and characterized Branscum as one of their best informants. Powers's state court testimony also established his involvement in cultivating Branscum as an informant.

We must also reject Garcia's claim that Powers's testimony on behalf of the prosecution at Garcia's state trial was the inadmissible fruit of the wrongful admission, at the state trial, of Garcia's compelled *Lybarger* statements.[1] This is not a question of the state having impelled *Garcia* to testify by virtue of using his compelled statements. Garcia cannot argue that the use of his statements was the "but-for" cause of Powers's testimony, because Powers, who testified for the state, did not testify "in order to overcome the impact of confessions illegally obtained." *Harrison v. United States*, 392 U.S. 219, 223, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

Finally, we find no error in the use of an uncharged overt act to satisfy the statute of limitations because 18 U.S.C. § 241 does not require proof of an overt act – the jury need only find an agreement within the limitations period. *See United States v. Skillman*, 922 F.2d 1370, 1373 n. 2, 1375-76 (9th Cir.1990). The jury instruction in this case went beyond the requirements of § 241 in requiring an act within the limitations period. We also hold that the district court did not clearly err in admitting a statement by inmate and co-conspirator Thomas Hampton to inmate

---

[1] *See Lybarger v. City of Los Angeles*, 40 Cal.3d 822, 830, 221 Cal.Rptr. 529, 710 P.2d 329, 333 (1985) (public official may be compelled to give testimony but the Fifth Amendment precludes any use of that testimony against official in subsequent criminal proceedings).

Gene Ebright, which was corroborated, in any case, by Ebright's testimony that he had observed Powers exiting his cell and that moments later he discovered a knife under his pillow.

AFFIRMED.

United States District Court
Northern District of California

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(For Offenses Committed On or After November 1, 1987)
JOSE RAMON GARCIA	CASE NUMBER: CR-00-0105 MJJ
	Matthew B. Pavone Defendant's Attorney

(Filed Feb. 12, 2003)

THE DEFENDANT:

[ ] pleaded guilty to count(s): ___

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[X] was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 USC 241	Conspiracy Against Civil Rights	2/22/2000	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___.

[ ] Count(s) ___ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.
457-51-2412

Defendant's Date of Birth:
07/25/1954

Defendant's U.S.M. No.:
95090-011

Defendant's Residence Address
Sweden House Hotel
570 O'Farrell Street, Rm. 205
San Francisco, CA 94102

Defendant's Mailing Address:
same as above

February 6, 2003
Date of Imposition of Judgment

/s/Martin J. Jenkins
Signature of Judicial Officer

Honorable Martin J. Jenkins,
U.S. District Judge
Name & Title of Judicial Officer

2/12/2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 76 months.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ on ___.

[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[X] Defendant shall appear before Judge Martin Jenkins on **March 6, 2003 @ 4:00 p.m.** in courtroom 11 for placement and self surrender date.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on Supervised Release you shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[ ] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

Revocation of supervised release in mandatory for refusal to comply with drug testing imposed as a condition of supervision. 18 U.S.C. Sections 3565(b)(3) and 3583(g)(3)

You shall pay the assessment imposed in accordance with 18 U.S.C. Section 3013, and shall immediately notify the probation officer of any change in your economic circumstances that might affect your ability to pay a special assessment, fine, restitution, or co-payments ordered by the Court.

If the judgement imposed a fine or a restitution obligation, it shall be a condition of supervision that you pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with

any Schedule of Payments set forthin the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the probation officer in meeting any financial obligations.

STANDARD CONDITIONS OF SUPERVISION

It is the order of the Court that the defendant shall comply with the following standard conditions:

1) the defendant shall not leave the judicial district or other specified geographical area without permission of the Court or the probation officer;

2) the defendant shall report to the probation officer as directed by the Court or the probation officer, and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities, including but not limited to, compliance with the terms of any court order or administrative process pursuant to the laws of a state, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7) The defendant shall consume no alcohol if sentenced to the special condition that the defendant are to participate in a drug/alcohol program;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

14) the defendant shall notify third parties of risks related to the defendant's criminal record, personal history, or characteristics, and shall permit the probation officer to make such notifications and/or confirm the defendant compliance with this notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1 The defendant shall not have contact with any co-defendant, in this case namely, EDWARD MICHAEL POWERS.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments directly following the Monetary Penalties section.

	Assessment	Fine	Restitution
Totals:	$100.00	$0	$0

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$___	$___	

[ ] If applicable, restitution amount ordered pursuant to plea agreement $___

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [X] Lump sum payment of $100.00 due immediately, balance due

[ ] not later than ___, or

[ ] in accordance with ( ) C, ( ) D, or ( ) E below); or

B [ ] Payment to begin immediately (may be combined within ( ) C, ( ) D, or ( ) E below); or

C [ ] Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of ___ (e.g., months or year(s)), to commence ___ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $___ over a period of ___ (e.g., months or years), to commence ___ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

_____

United States District Court
Northern District of California

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(For Offenses Committed On or After November 1, 1987)
EDWARD MICHAEL POWERS	CASE NUMBER: CR-00-0105 MJJ
	Wayne Ordos Defendant's Attorney

(Filed Feb. 12, 2003)

THE DEFENDANT:

[ ] pleaded guilty to count(s): ___

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[X] was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC 241	Conspiracy Against Civil Rights	2/22/2000	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___.

[ ] Count(s) ___ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.
563-64-0791

Defendant's Date of Birth:
07/31/1946

Defendant's USM No.:
95091-011

Defendant's Residence Address
97779 North Bank Road
Brookings, OR 97415

Defendant's Mailing Address:
97779 North Bank Road
Brookings, OR 97415

February 6, 2003
Date of Imposition of Judgment

/s/ Martin J. Jenkins
Signature of Judicial Officer

Honorable Martin J. Jenkins,
U.S. District Judge
Name & Title of Judicial Officer

2/12/2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 84 months.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ on ___.

[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[X] Defendant shall appear before Judge Martin Jenkins on March 6, 2003 @ 4:00 p.m. in courtroom 11 for placement and self surrender date.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on Supervised Release you shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[ ] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

Revocation of supervised release in mandatory for refusal to comply with drug testing imposed as a condition of supervision. 18 U.S.C. Sections 3565(b)(3) and 3583(g)(3)

You shall pay the assessment imposed in accordance with 18 U.S.C. Section 3013, and shall immediately notify the probation officer of any change in your economic circumstances that might affect your ability to pay a special assessment, fine, restitution, or co-payments ordered by the Court.

If the judgement imposed a fine or a restitution obligation, it shall be a condition of supervision that you pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with

any Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the probation officer in meeting any financial obligations.

STANDARD CONDITIONS OF SUPERVISION

It is the order of the Court that the defendant shall comply with the following standard conditions:

1) the defendant shall not leave the judicial district or other specified geographical area without permission of the Court or the probation officer;

2) the defendant shall report to the probation officer as directed by the Court or the probation officer, and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities, including but not limited to, compliance with the terms of any court order or administrative process pursuant to the laws of a state, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7) The defendant shall consume no alcohol if sentenced to the special condition that the defendant are to participate in a drug/alcohol program;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

14) the defendant shall notify third parties of risks related to the defendant's criminal record, personal history, or characteristics, and shall permit the probation officer to make such notifications and/or confirm the defendant compliance with this notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1 The defendant shall not have contact with any co-defendant, in this case namely, JOSE RAMON GARCIA.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments directly following the Monetary Penalties section.

	Assessment	Fine	Restitution
Totals:	$100.00	$25,000.00	$0

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:		$___	$___

[ ] If applicable, restitution amount ordered pursuant to plea agreement $___

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [X] Lump sum payment of $100.00 due immediately, balance due

[X] not later than termination of Supervised Release, or

[ ] in accordance with ( ) C, ( ) D, or ( ) E below; or

B [ ] Payment to begin immediately (may be combined within ( ) C, ( ) D, or ( ) E below); or

C [ ] Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of ___ (e.g., months or year(s)), to commence ___ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $___ over a period of ___ (e.g., months or years)), to commence ___ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [X] Special instructions regarding the payment of criminal monetary penalties: Payment schedule to be established by Probation Office.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

_____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE RAMON GARCIA, Defendant-Appellant.	No. 03-10067 D.C. No. CR-00-00105-MJJ Northern District of California, San Francisco ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD MICHAEL POWERS, Defendant-Appellant.	No. 03-10071 D.C. No. CR-00-00105-MJJ Northern District of California, San Francisco

(Filed Jan. 18, 2005)

Before: OAKES,* KLEINFELD, and CALLAHAN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Kleinfeld and Judge Callahan have voted to deny the petition for rehearing en banc and Judge Oakes so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested

* The Honorable James L. Oakes, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are **DENIED.**

Supreme Court, U.S.
FILED
AUG 15 2005
OFFICE OF THE CLERK

(2)

No. 04-1564

In the Supreme Court of the United States

JOSE RAMON GARCIA AND
EDWARD MICHAEL POWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REDACTED
BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the introduction into evidence of excerpts of petitioner Garcia's interview with a state investigator violated his rights under the Self-Incrimination Clause of the Fifth Amendment.

2. Whether the pretrial disqualification of petitioner Powers's original attorneys and the procedures leading to that disqualification violated his Sixth Amendment right to counsel or his due process rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	19
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	17
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	8
Butterworth v. *Smith*, 494 U.S. 624 (1990)	18
Chavez v. *Martinez*, 538 U.S. 760 (2003)	11, 14
Clewis v. *Texas*, 386 U.S. 707 (1967)	11
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	18
Hall v. *United States*, 371 F.3d 969 (7th Cir. 2004)	16
Hamilton-Brown Shoe Co. v. *Wolf Bros & Co.*, 240 U.S. 251 (1916)	8
Harrison v. *United States*, 392 U.S. 219 (1968)	13, 14
Kastigar v. *United States*, 406 U.S. 441 (1972)	4, 9, 10, 11
Kentucky v. *Stincer*, 482 U.S. 730 (1987)	18, 19
Lybarger v. *City of Los Angeles*, 710 P.2d 329 (Cal. 1985)	3
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001)	9
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	17
Miranda v. *Arizona*, 384 U.S. 436 (1966)	3, 11
Missouri v. *Seibert*, 124 S. Ct. 2601 (2004)	11, 14, 15
Oregon v. *Elstad*, 470 U.S. 298 (1985)	10, 11, 12, 15

Cases—Continued: Page

Rodriguez v. *Chandler*, 382 F.3d 670 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005) 16
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 19
United States v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) 8, 9
United States v. *Apfelbaum*, 445 U.S. 115 (1980) 10
United States v. *Booker*, 125 S. Ct. 738 (2005) 8
United States v. *Gagnon*, 470 U.S. 522 (1985) 19
United States v. *Johnson*, 319 U.S. 503 (1943) 18
United States v. *Mays*, 69 F.3d 116 (6th Cir. 1995), cert. denied, 517 U.S. 1246 (1996) 20
United States v. *Patane*, 124 S. Ct. 2620 (2004) 15
United States v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) 18
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 14
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 8
Wheat v. *United States*, 486 U.S. 153 (1988) 15, 16, 17
Westover v. *United States*, 384 U.S. 436 (1966) 11

Constitution, statute and rule:

U.S. Const.:
Amend. V 7, 9, 10, 11, 14, 17
Due Process Clause 18
Self-Incrimination Clause 9
Amend. VI 15
18 U.S.C. 241 2
9th Cir. R. 36-3 21

Miscellaneous:

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 9

In the Supreme Court of the United States

No. 04-1564

JOSE RAMON GARCIA AND
EDWARD MICHAEL POWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REDACTED
BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals affirming petitioners' convictions (Pet. App. 1-4) is not published in the *Federal Reporter* but is *reprinted in* 114 Fed. Appx. 292. The court's remand order regarding sentencing is not published in the *Federal Reporter* but is *available at* 2005 WL 1529702. An earlier opinion regarding release pending appeal is reported at 340 F.3d 1013.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2004. Petitions for rehearing were denied on January 18, 2005 (Pet. App. 25-26). On April 11, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 18, 2005, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioners were convicted of conspiring to deprive prison inmates of their constitutional right to be free from cruel and unusual punishment, in violation of 18 U.S.C. 241. Pet. App. 2. The district court sentenced petitioners Garcia and Powers to 76 and 84 months of imprisonment, respectively. *Id.* at 6, 16. The court also ordered Powers to pay a $25,000 fine. *Id.* at 21. The court of appeals affirmed petitioners' convictions (*id.* at 1-4), but it remanded the case to the district court to consider whether resentencing was warranted. 2005 WL 1529702. The district court has not yet addressed the sentencing issues on remand.

1. During the early and mid-1990s, petitioners served as correctional officers at the Pelican Bay State Prison in Crescent City, California. Petitioner Powers supervised petitioner Garcia, and they were close friends. Powers was the leader of a powerful, close-knit group of correctional officers, including Garcia. Both men established relationships with various prisoners who held leadership positions and were known as "shot callers" for the purpose of arranging attacks on disfavored prisoners, especially those who had been convicted of child molestation or other sexual offenses. By this method, petitioners orchestrated numerous attacks. 1 Gov't C.A. Br. 4-6.

For example, in late 1994, Garcia approached inmate Thomas Branscum, whose friendship Garcia cultivated by, *inter alia*, giving him gifts, and told him to arrange an assault on Arthur Meeks, a convicted child molester.

Garcia showed Meeks's file to Branscum to confirm Meeks's status as a sex offender. Branscum enlisted another inmate to carry out the attack and told Garcia when it would occur. Before the attack, Garcia contacted Powers, who came to the dining hall where Garcia was located. Both petitioners were present when Meeks was attacked. 1 Gov't C.A. Br. 11-12.

2. On September 29, 1995, state investigators conducted a compelled interview of petitioner Garcia at the prison. Three investigators, including Special Agent George Ortiz, participated. Pet. C.A. E.R. 34-128. Before the substantive questioning began, Ortiz advised Garcia of his rights and obligations under *Lybarger* v. *City of Los Angeles*, 710 P.2d 329 (Cal. 1985), telling him that he must answer questions but that "none of [his] statements nor any additional evidence which is gained by reason of such statements can be used against [him] in any criminal proceedings." Pet. C.A. E.R. 47.

The next day, Garcia contacted Ortiz and insisted on meeting with him alone, claiming that he had not been completely truthful in the earlier interview but wanted to cooperate with the investigation. Ortiz agreed to meet Garcia at a motel. Gov't C.A. E.R. 84-85.

That meeting took place on October 2, 1995. At the outset, Ortiz advised Garcia, pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that he had the right to remain silent and that anything he said would be used against him in court. Garcia said he understood and nonetheless wanted to answer questions. Pet. C.A. E.R. 131-132. In contrast to the September 29 interview, Ortiz did not tell Garcia that he was required to answer questions or that his statements would be inadmissible against him.

During the October 2 interview, Garcia explained that he had been reluctant to tell the truth in the previous interview because of the presence of the other two investigators. Pet. C.A. E.R. 132, 144, 160. Garcia suggested that he had requested the October 2 interview to expose alleged wrongdoing by others, including one of the investigators, whom Garcia accused of covering up the stabbing of an inmate. *Id.* at 132, 144-145, 160-169. In addition, Garcia explained that he had come forward to talk to Ortiz because he was concerned that working conditions at the prison had become dangerous for correctional officers, due to the widespread consumption of alcohol by inmates and low morale among the staff. *Id.* at 182.

Later, in pretrial rulings, the district court concluded that the October 2 interview was not itself compelled and was not tainted in its entirety by Garcia's earlier compelled interview. Gov't C.A. E.R. 60, 126. The court held that the United States had met its burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), of showing that 15 categories of Garcia's testimony from the October 2 interview were derived "from legitimate sources wholly independent of the compelled testimony" from the September 29 interview. Pet. C.A. E.R. 24-26. The court admitted excerpts of the October 2 interview that fell within those categories. *Id.* at 206-207.

3. The law firm of Rains, Lucia & Wilkinson (Rains) had represented several prison employees who testified before the grand jury that indicted petitioners. Shortly after his indictment, petitioner Powers retained Rains to defend him in this case. Gov't C.A. E.R. 1-4.

The United States moved to disqualify Rains because of a potential conflict of interest. The motion explained that the United States anticipated calling as trial

witnesses at least some of the Rains clients who had testified before the grand jury, thus putting the firm in the untenable position of having to cross-examine its own clients. Pet. C.A. Supp. E.R. 1-10 (filed under seal).

Soon thereafter, the United States disclosed to Powers's attorneys the names of the seven correctional officers who were the subject of the government's motion. Pet. C.A. Supp. E.R. 62-63. **[REDACTED.]**

Powers filed an opposition to the motion to disqualify, along with supporting declarations from himself and his attorneys. Pet. C.A. Supp. E.R. 11-27, 61-71. The Rains firm asserted that it had terminated the attorney-client relationship with the seven officers, *id.* at 17, who it stated were "assumedly percipient witnesses to overt acts alleged in the Indictment," *id.* at 22. Powers submitted declarations stating that he understood the potential risk of a conflict but wanted to retain Rains as his counsel. *Id.* at 61-71. Powers later filed additional documents opposing disqualification, including declarations from the seven officers stating that they did not believe they had relevant information adverse to Powers or helpful to the government. *Id.* at 72-99.

On May 8, 2000, the district court held its first hearing on the motion. Part of the hearing was open to the defense (Gov't C.A. E.R. 11-30), but one portion was held *in camera* outside the presence of Powers and his attorneys. Pet. C.A. Supp. E.R. 29-49. At the court's request, the government later submitted a sealed proffer setting forth the information discussed during the closed portion of the hearing. *Id.* at 50-60. **[REDACTED.]**

[REDACTED.] At the time of the *in camera* hearing and sealed proffer, the grand jury investigation was ongoing. See *id.* at **[REDACTED]** 141-142, 147.

On June 5, 2000, the district court held a second hearing on the disqualification motion, which Powers and his counsel attended in full. Pet. C.A. Supp. E.R. 100-132. After questioning Powers about his proposed conflict waiver, the court granted the motion to disqualify Rains. *Id.* at 121-131. The court found "a serious potential for conflict," *id.* at 126, and concluded that "the conflict cannot be waived consistent with the defendant receiving a fair trial," *id.* at 130. The court found it unlikely that Powers and the former Rains clients could make a "knowing and intelligent waiver at this early juncture in the litigation," given the unpredictability about how the case might evolve. *Id.* at 126.

Powers moved for reconsideration, and the district court held another hearing on June 29, 2000, at which Powers's attorneys presented argument. Pet. C.A. Supp. E.R. 139-158. The court denied the motion, rejecting Powers's contention that the *ex parte* hearing or the government's sealed proffer violated his due process rights. *Id.* at 148-152. The court emphasized that even apart from the information disclosed in the *ex parte* session and sealed proffer, there "was sufficient evidence for the court to make the exact ruling that it did on this record." *Id.* at 150.

Trial began on April 1, 2002, nearly two years after the United States filed its disqualification motion. Officer Joseph Manzano, one of the former Rains clients, testified as a government witness and was cross-examined by Powers's attorney. 4/4/02 Tr. 226-259. Manzano corroborated key portions of the testimony of another government witness who linked Powers to the stabbing of an inmate. 4/3/02 Tr. 61-68,

148. In addition, the United States subpoenaed Mark Payne, another former Rains client, to testify about an attack on an inmate, but Payne invoked his Fifth Amendment privilege. 4/25/02 Tr. 2419-2437.

4. The court of appeals affirmed petitioners' convictions in an unpublished memorandum opinion. Pet. App. 2-4. The court held that the district court had not abused its discretion in disqualifying the Rains firm, because its former representation of "numerous current or former Pelican Bay prison guards who testified before the federal grand jury, some of whom the government contemplated calling as witnesses," created "a serious potential for conflict of interest." *Id.* at 2. The court also rejected Powers's claim that the district court's *ex parte* hearing and acceptance of a sealed proffer denied him due process, observing that "he had notice of the hearing and proffer and was given the opportunity to present evidence and argument in opposition to disqualification." *Ibid.*

The court of appeals next held that the district court had "properly admitted" the October 2 interview of Garcia. Pet. App. 2. Based on the facts that "Garcia voluntarily requested to meet with Agent Ortiz alone, the interview took place at a motel, three days after the administrative interrogations, [and] Garcia was specifically advised of his Miranda rights and waived them," *ibid.*, the court concluded that Garcia "became an independent and legitimate source of the evidence," *ibid.*[1]

5. On January 18, 2005, the court of appeals denied petitions for rehearing and rehearing en banc. Pet.

---

[1] The court of appeals rejected several other arguments advanced by petitioners (Pet. App. 2-4), none of which they raise here.

App. 25-26. Petitioners moved for permission to file a second rehearing petition to seek resentencing under *United States* v. *Booker*, 125 S. Ct. 738 (2005). On June 30, 2005, the court granted that motion and remanded the case to the district court to consider, pursuant to the procedures established in *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), whether petitioners' sentences would have been materially different under the sentencing scheme mandated by *Booker*. 2005 WL 1529702. The district court has not yet addressed the sentencing issues on remand.

ARGUMENT

Petitioners renew their challenges (Pet. 7-15) to the admission of excerpts of Garcia's October 2, 1995 interview, and to the disqualification of Powers's attorneys. These claims do not merit further review. The court of appeals' unpublished decision is interlocutory, is correct, and does not conflict with the decisions of this Court or any other circuit.

1. The interlocutory posture of this case in itself weighs against certiorari here. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari). After the filing of the petition for a writ of certiorari, the court of appeals remanded the case to the district court to determine whether resentencing was warranted in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). See 2005 WL 1529702 (June 30, 2005). The district court has not yet addressed the sentencing issues on remand. Petitioners will have the right to appeal the decision the district court makes on remand, regardless

of whether the court imposes new sentences or allows the original ones to stand. See *United States* v. *Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc).

The denial of a writ of certiorari at this time does not preclude petitioners from raising the same issues (in addition to any sentencing issue resolved on remand) in a later petition if the Ninth Circuit affirms their sentences after the remand. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-259 n.59 (8th ed. 2002). That practice promotes judicial efficiency by ensuring that all of petitioners' claims will be consolidated and presented in a single petition to this Court. *Ibid.* There is no reason to depart from that practice here.

2. Petitioners argue (Pet. 7-11) that the court of appeals erred in upholding the admission into evidence of excerpts from Garcia's interview with Agent Ortiz on October 2, 1995. They contend that admitting those excerpts violated Garcia's rights under the Self-Incrimination Clause of the Fifth Amendment. The court of appeals' holding is correct and, contrary to petitioners' assertion (Pet. 7), does not conflict with decisions of this Court.

When a governmental entity compels a person to answer questions, the Fifth Amendment generally precludes use or derivative use of the responses against that individual in a criminal prosecution. *Kastigar* v.

United States, 406 U.S. 441, 453, 458-461 (1972).[2] Because Garcia gave compelled statements on September 29, 1995, petitioners are correct that the United States had the burden under *Kastigar* to prove that the evidence it introduced against Garcia, including the October 2 interview, was derived from legitimate sources independent of the September 29 statements. See *id.* at 460-461.

Petitioners are mistaken, however, in suggesting (Pet. 8-9 & n.2) that the court of appeals failed to apply *Kastigar* in this case. Although the court of appeals' opinion did not cite *Kastigar* by name, the court applied the standard mandated by *Kastigar*, concluding that Garcia "became an independent and legitimate source of the evidence" by initiating contact with Ortiz and voluntarily answering questions during the October 2 interview. Pet. App. 2; cf. *Kastigar*, 406 U.S. at 461 (the relevant question is whether the government's evidence was derived from "legitimate independent sources").

Petitioners urge this Court (Pet. 9) to grant review in order to reject the argument that *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and other *Miranda* cases "ha[ve] entirely superseded *Kastigar*" and its progeny. This case does not present an appropriate vehicle for addressing that issue. The court of appeals applied the *Kastigar* standard, and all parties in this case agree that *Kastigar* governs the admissibility of the October 2 interview. Contrary to petitioners' assertion (Pet. 9), the United States did not argue below—and is not asserting here—that *Elstad* or other *Miranda* cases

---

[2] The Fifth Amendment does not bar use of compelled statements in a prosecution for perjury or making false declarations. See *United States* v. *Apfelbaum*, 445 U.S. 115, 124-132 (1980).

have displaced *Kastigar*. In fact, the United States acknowledged in the court of appeals that *Kastigar* governed this case. See 1 Gov't C.A. Br. 27, 31-32, 36. Petitioners are thus asking the Court to use this case to repudiate a position that the court of appeals did not adopt and no party is advocating.

The court of appeals not only used the proper standard but also correctly applied it to the facts of this case. "When a prior statement is actually coerced," a court must decide "whether that coercion has carried over into the second confession" by assessing whether there was "a break in the stream of events" between the two statements. *Elstad*, 470 U.S. at 310 (citing *Westover* v. *United States*, decided together with *Miranda* v. *Arizona*, 384 U.S. 436, 494 (1966), and *Clewis* v. *Texas*, 386 U.S. 707 (1967))[3]; see *Kastigar*, 406 U.S. at 461 ("The statutory proscription [against using immunized testimony directly or indirectly against the witness in a criminal case] is analogous to the Fifth Amendment requirement in cases of coerced confessions."); see also *Chavez* v. *Martinez*, 538 U.S. 760, 769-770 (2003) (plurality opinion) (the protection against

---

[3] *Elstad* itself did not involve a statement that was "actually coerced"; rather, it involved two voluntary statements, the first of which was not preceded by *Miranda* warnings. The Court held that in those circumstances, the giving of *Miranda* warnings before the second confession was sufficient "to cure the condition that rendered the unwarned statement inadmissible." 470 U.S. at 311. Five Justices of this Court subsequently agreed that when police officers intentionally withhold *Miranda* warnings with an eye toward inducing the suspect to confess and then re-confess upon receiving warnings, the provision of *Miranda* warnings before the second confession, without more, is insufficient to render it admissible. *Missouri* v. *Seibert*, 124 S. Ct. 2601, 2608-2613 (2004) (plurality opinion); *id.* at 2614-2616 (Kennedy, J., concurring in the judgment).

the use or derivative use of a suspect's statements that are the product of coercive police interrogation is "coextensive with the use and derivative use immunity mandated by *Kastigar* when the government compels testimony from a reluctant witness").

Such a break occurred between the interviews on September 29 and October 2, 1995. Garcia actively sought the October 2 interview and dictated who would attend. The questioning on October 2 took place three days after the earlier interview and was held at a motel, a far more neutral location than the prison where Garcia had made his earlier compelled statements. See *Elstad*, 470 U.S. at 310 (passage of time and change of locations between statements are relevant in assessing whether taint has carried over to the second interview). Moreover, at the outset of the October 2 interview, Garcia received a *Miranda* warning that he had the right to remain silent and that anything he said would be used against him in court, in sharp contrast to the September 29 interview where he was told that he must answer questions but that his statements could not be used against him in a criminal proceeding. These facts show that the October 2 interview was untainted by the compelled statements on September 29. Thus, by answering questions during the untainted October 2 interview, Garcia himself became a legitimate, independent source of evidence for purposes of *Kastigar*.[4] Pet. App. 2.

---

[4] Not only was there a clear break in the stream of events, but also, as the district court found with respect to the portions of the October 2 interview it deemed admissible, the questions that Agent Ortiz put to Garcia were in no way influenced by Garcia's prior compelled testimony. See Pet. C.A. E.R. 24-26, 192-207.

Petitioners nonetheless contend (Pet. 4, 10) that the October 2 interview was tainted because Garcia supposedly felt obliged to request that interview because one of the investigators had stated during the September 29 interrogation that his compelled answers could be used for impeachment purposes. That fact-bound issue does not warrant this Court's review. At any rate, it is doubtful that Garcia misunderstood his legal protections by the time he began answering substantive questions during the September 29 interview. Although one prison official initially stated that "anything as you know in this interview may be used for impeachment purposes," Pet. C.A. E.R. 43, a different investigator—the one who questioned Garcia most extensively—later advised Garcia just before the substantive portion of the interview that "none of your statements nor any additional evidence which is gained by reason of such statements can be used against you in any criminal proceedings," *id.* at 47.

Petitioners assert (Pet. 9), however, that the government had the burden under *Harrison* v. *United States*, 392 U.S. 219 (1968), of proving that Garcia would have requested the interview on October 2 even if he had not been compelled to speak on September 29. *Harrison* is inapposite here.

Harrison involved a decision by a criminal defendant to testify at trial after the prosecution had already violated his rights by introducing his illegally obtained confessions as evidence at the same trial. After the defendant's conviction was overturned because of that violation, the prosecution sought to introduce the defendant's testimony from the first trial as evidence against him on retrial. 392 U.S. at 220-221. By placing the burden on the prosecution to prove that the defendant would have testified at the first trial even if no

violation of his rights had occurred, this Court sought to prevent the government from unjustly benefitting from a violation for which it was responsible. See *id.* at 224-225.

Here, by contrast, the October 2 interview was not preceded by any such violation of Garcia's rights. Although investigators had compelled Garcia's statements on September 29, 1995, such compulsion itself does not violate the Fifth Amendment. A violation, if any, would occur only if the compelled statements (or evidence derived therefrom) were used against Garcia in a criminal trial. See *Chavez*, 538 U.S. at 767 (plurality opinion); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). When he gave the interview on October 2, Garcia was not confronted with the dilemma of having to testify in order to mitigate the effects of a constitutional violation that had already occurred.

Nor does *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004) "thoroughly undermine[]" (Pet. 10) the court of appeals' conclusion that Garcia became an "independent and legitimate source." Pet. App. 2. In *Seibert*, the police intentionally withheld *Miranda* warnings until an interrogation had produced a confession and then, after a short break, advised the suspect of her *Miranda* rights and had her repeat the confession. The plurality concluded that the second confession was inadmissible because, under those circumstances, the *Miranda* warnings were ineffective. 124 S. Ct. at 2609-2613 (plurality opinion). *Seibert* involved what was, in effect, a single interrogation. See *id.* at 2610 n.4, 2613. The two portions of the interview in *Seibert* were separated by only 20 minutes, and both were initiated by the police and took place in the same location. *Id.* at 2606, 2612. By contrast, Garcia's subsequent interview followed the earlier one by three days, Garcia requested

the October 2 interview, and the interviews took place in very different settings. *Seibert* thus does not call into question the correctness of the court of appeals' decision.

Finally, petitioners seek a remand in light of *United States* v. *Patane*, 124 S. Ct. 2620 (2004), on the ground that the government's arguments below "sought to obliterate" the distinction between "statements taken without *Miranda* warnings (though not actually compelled)" and "actually compelled testimony." Pet. 10 (quoting *Patane*, 124 S. Ct. at 2627 (plurality opinion)). Arguments by parties that are not adopted by the court of appeals do not provide a basis for this Court's review. At any rate, petitioners have misstated the government's position. The United States did not contend that the admissibility of the October 2 interview should be judged by the same standard that would apply if Garcia's September 29 statements had been voluntary but elicited in violation of *Miranda*. Rather, the United States acknowledged that the proper standard was the one this Court applies in cases "[w]hen a prior statement is *actually coerced*." 1 Gov't C.A. Br. 32-33 (quoting *Elstad*, 470 U.S. at 310 (emphasis added)).

3. The court of appeals correctly upheld the disqualification of Powers's original counsel, as well as the procedures used by the district judge in ruling on the disqualification issue. Those holdings do not conflict with the decisions of this Court or any other circuit.

a. The Sixth Amendment encompasses a qualified right to have counsel of one's choice, which may be overcome by a showing of "a serious potential for conflict" of interest. *Wheat* v. *United States*, 486 U.S. 153, 164 (1988). Such a conflict can arise when defense counsel's former clients are called as government wit-

nesses. *Ibid.* One concern "is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information." *Hall* v. *United States*, 371 F.3d 969, 973 (7th Cir. 2004) (internal quotation marks omitted).

The court of appeals correctly concluded that Rains's continued representation of Powers "presented a serious potential for conflict of interest." Pet. App. 2. The Rains firm had represented seven correctional officers who testified before the grand jury that indicted Powers. At the time of the disqualification motion, the United States anticipated calling some of the officers as government witnesses, and, in fact, one of them ultimately testified as a prosecution witness at trial and was cross-examined by Powers's counsel. Thus, had the Rains firm not been disqualified, it would have been placed in the untenable position of having to cross-examine a former client.

Petitioners argue that the court of appeals' decision is "directly at odds" (Pet. 14) with *Rodriguez* v. *Chandler*, 382 F.3d 670 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005), which held that the disqualification of a defendant's attorney was error. *Rodriguez*, however, involved a quite different set of facts. The prosecutor in *Rodriguez* successfully sought disqualification of defense counsel on the ground that another client of the attorney would be called as a vital government witness. *Id.* at 671-672. In fact, the client was never called to testify, the prosecutor "never explained this about-face," *id.* at 672, and the government did not argue to the Seventh Circuit that the client "could have provided *any* admissible evidence," *ibid.* Thus, in the opinion of the *Rodriguez* court, the prosecutor's entire justification for disqualification had evaporated without explanation. That is not the case here. One of the

former Rains clients did testify as a prosecution witness—a fact that by itself demonstrates that disqualification was proper. See p. 6, *supra*. Moreover, the government tried to call another of the former clients to testify about an assault on an inmate, but that officer invoked his Fifth Amendment privilege.[5] See *ibid.*

Although the other former clients did not testify as government witnesses, that fact neither undermines the legitimacy of the disqualification nor supports petitioners' claim that the prosecutor made "false" representations (Pet. 14-15). The potential for conflict must be judged "not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly." *Wheat*, 486 U.S. at 162. In this case, the inherent difficulty of predicting in advance precisely how the evidence and litigation strategies would evolve was complicated by the lapse of nearly two years between the filing of the disqualification motion and the start of trial.

b. Petitioners argue (Pet. 11-13) that the district court deprived Powers of due process by receiving *ex parte*, *in camera* submissions from the government in ruling on the disqualification motion. The court of appeals correctly rejected that argument.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). Powers was afforded such an opportunity. The district judge held two hearings prior to ordering disqualification. A portion of the first hearing

---

[5] **[REDACTED.]**

and the entire second hearing were open to the defense. Moreover, Powers and his attorneys filed numerous written submissions in opposition to the disqualification motion, including declarations from Powers and each of the seven former clients. After the disqualification ruling, the district court held another hearing on a motion to reconsider at which the defense again made its case.

The district court's limited use of *ex parte*, *in camera* procedures was justified by the need to preserve the secrecy of an ongoing grand jury investigation, protect grand jury witnesses from intimidation or retaliation by petitioners and their co-conspirators, and prevent premature disclosure of the prosecution's strategy for encouraging those grand jury witnesses to cooperate with the government. See Pet. C.A. Supp. E.R. 144-148. This Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings." *Butterworth* v. *Smith*, 494 U.S. 624, 630 (1990) (quoting *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)). "This 'indispensable secrecy of grand jury proceedings' must not be broken except where there is a compelling necessity." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (quoting *United States* v. *Johnson*, 319 U.S. 503, 513 (1943)).

Petitioners suggest (Pet. 11), however, that the court of appeals' decision conflicts with *Kentucky* v. *Stincer*, 482 U.S. 730 (1987), which stated that the Due Process Clause guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to the outcome if his presence would contribute to the

fairness of the procedure." *Id.* at 745.[6] But "this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow.'" *Ibid.* (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 106-107 (1934)). Thus, the "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985).

Powers has identified no reason to believe that his presence during the *in camera* portion of the first hearing could have affected the outcome of the disqualification ruling. See *Stincer*, 482 U.S. at 747 (defendant's exclusion from competency hearing did not violate due process where he gave "no indication that his presence * * * would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify"). Indeed, the district court emphasized that even if it had disregarded the information the government presented for *in camera* and *ex parte* review, "there is and was sufficient evidence for the court to make the exact ruling that it did on this record."[7] Pet. C.A. Supp. E.R. 150.

Contrary to petitioners' suggestion (Pet. 12-13), the court of appeals' rejection of Powers's due process argument does not conflict with the decisions of other circuits. Petitioners cite a number of decisions indi-

---

[6] Petitioners also cite *Arizona* v. *Fulminante*, 499 U.S. 279 (1991) (Pet. 11), but that decision addressed whether admission of a coerced confession can be harmless error, not whether the defense can be excluded from a hearing.

[7] Powers was able to review the *in camera* submissions for purposes of his appeal, yet his petition does not identify anything in those materials that would have been useful to him in opposing the government's motion.

cating that, when confronted with a potential conflict of interest, a judge ordinarily should conduct a hearing and provide the defense an opportunity to present argument and evidence in support of its position. The district judge in this case conducted not one but three hearings on the disqualification issue (two of which were open in their entirety and a third that was partially open to the defense) and allowed Powers to make numerous written and oral submissions in opposition to disqualification. See Pet. C.A. Supp. E.R. 11-27, 71-152; Gov't C.A. E.R. 1-30.

Nor does the court of appeals' decision conflict with *United States* v. *Mays*, 69 F.3d 116 (6th Cir. 1995), cert. denied, 517 U.S. 1246 (1996) (see Pet. 13), which stated that a disqualification motion "will ordinarily require a hearing at which both parties will be permitted to produce witnesses for examination and cross-examination." 69 F.3d at 121. The court in *Mays* did not hold that such a hearing is always required, and indeed, affirmed a disqualification ruling despite the trial judge's failure to hold *any* hearing. *Id.* at 121-122. Moreover, nothing in *Mays* suggests that all hearings must be open to the defense even where, as here, such openness would violate grand jury secrecy and expose witnesses to possible intimidation.

Finally, petitioners assert (Pet. 11) that the court of appeals' decision has "potentially sweeping consequences" because it might allow judges to bar the defense from hearings on motions to exclude evidence or from the government's closing argument at trial. Nothing in the court of appeals' opinion supports that concern, because the proceedings at issue here concerned the disqualification of counsel, not matters going to the merits of the case. At any rate, the decision is unpublished, non-precedential, and hence unlikely to

significantly affect the development of the law, given the Ninth Circuit's limitations on citation of unpublished opinions. See 9th Cir. R. 36-3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys

AUGUST 2005